No. 83-989

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IN THE

Supreme Court of the United States

October Term, 1983

WILLIAM N. JAMES, *et al.*,

Petitioners,

–against–

TENNESSEE VALLEY AUTHORITY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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February 17, 1984

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ARGUMENT

The Solicitor General's brief contains four key factual errors that, although they may not be readily apparent, are so central to the issues raised in the petition that a brief reply is warranted.

First, respondents assert that if the court of appeals erred, it erred only in the way it applied undisputed statistical principles to the facts. (Res. Br. p. 7.) Second, they argue that even if the court of appeals "misinterpreted the technical materials", the error is insignificant. (Res. Br. p. 9.) Third, they claim that there is no conflict in the circuits. Fourth, they assert that in this case it was proper to consider the job schedules separately because there was little or no evidence of movement between schedules. We show below that those assertions are either flatly wrong or so misleading as to be

distortive, and that the issues presented are of far more significance than such attempted trivialization of them would imply.

* * *

1. The court of appeals' fundamental error was in rejecting petitioners' multiple regression analyses on the ground that they lumped together employees with different jobs, and therefore "failed to control for job category". As the experts pointed out in their affidavits, the court was wrong as a matter of statistical principle. It was, they stated, simply not possible as a statistical matter to find the type of discrimination alleged by performing the analyses the way the court of appeals would have it done. No one could fairly read those affidavits (which were annexed to the petition) and come to the conclusion that the experts "merely explain how the authors would apply those [relevant] principles to the facts of this case". (Res. Br. p. 7.)[1] On the contrary, the experts, who were obviously in the best position to judge whether their own works were being understood correctly, took great pains to explain that the court was wrong as a matter of statistical principle, not just in its application of the proper theory to the facts.[2]

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[1] Respondents state that the works of Professors Fisher, Baldus and Cole were "cited simply as convenient summaries of the relevant principles, and both petitioners and respondents had cited these and similar works" in their briefs. (Res. Br. p. 7.) That is not only untrue but misses the whole point of the petition. The fact is that the cited works do not stand for the proposition for which the court cited them; they stand for the opposite proposition. As for the claim that both parties cited the works in their briefs, that is likewise untrue. Respondents cited the article by Professor Fisher on an unrelated point; the book by Professors Baldus and Cole was not cited by anyone but the court of appeals.

[2] Respondents' suggestion that petitioners had the "opportunity at trial to present additional expert testimony" on the point at issue here is disingenuous. (*See* Res. Br. P. 8.) Petitioners were given the opportunity to call a labor economist in order to present evidence refuting respondents' labor market analysis. Petitioners chose not to do so because they concluded that respondents' labor market analysis was irrelevant. The court of appeals ultimately expressly disregarded it. (*See* Pet. App. p. D-19 n. 18.)

2. Respondents state that even if the court below had acknowledged its error, the affidavits still "do not show that [the court's] misinterpretation was dispositive" since at best they show discrimination at a level of "between two and three" standard deviations rather than the "less than two" that it did find. (Res. Br. pp. 8-9.)[3] Respondents call that a "minor difference" in the results, but again the assertion is factually incorrect.

Both of the numbers respondents cite come from their own multiple regression analyses, not petitioners'. Respondents are comparing one of their own analyses to another of their own. In asserting that the affidavits "merely reanalyzed" the statistical evidence introduced at trial (*i.e.*, TVA's evidence), respondents ignore the central point of those affidavits: they establish that *petitioners'* regression analyses should have been considered. If they had been, the undisputed record would show racial discrimination well above any minimum level of significance.[4]

What respondents apparently refer to is the fact that petitioners' experts went on to say that even if the court of appeals had been correct in disregarding petitioners' statistical proof entirely, TVA's own multiple regression analyses themselves still show statistically significant levels of pay rate

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[3] Neither *Castaneda v. Partida*, 430 U.S. 482 (1977), nor *Hazelwood School District v. United States*, 433 U.S. 299 (1977), holds, or even suggests, as respondents state they do, that "standard deviations of more than two or three represent a minimum cognizable level of significance". Even if they did, however, petitioners' proof more than satisfies that requirement.

[4] Petitioners performed multiple regression analyses for three years, 1970, 1975 and 1979, for each of three data sets. (PX 516, 517.) It is not technically correct to refer to standard deviations in the context of multiple regressions, as respondents do; the proper reference is to the "t-statistic", a number that is comparable to the standard deviation. In petitioners' regressions, the lowest t-statistic for any year in any data set was 4.575; the highest was 8.570. Even when petitioners used all of the variables suggested by TVA, the lowest t-statistic was 3.555, and when the SF schedule was excluded entirely from the analysis, the t-statistic was still in excess of two. (PX 636.)

disparities in favor of whites on two job schedules at levels approximating between two and three standard deviations. But that is a far cry from saying that even if the court of appeals were to correct its "misunderstanding", the record would show discrimination only at those levels. Rather, it would show widespread, unexplained class-wide discrimination at the much higher levels established by petitioners' unrebutted proof.

3. Respondents state that there is no conflict among the circuits on the need to consider "differences in job qualifications". But that is not the issue with respect to which we claim there is a conflict. "Differences in job qualifications" is not even an issue here because the objective qualifications included in the regression analyses offered by both parties automatically take into account all differences in job qualifications applied by TVA.

Respondents compound the error by mischaracterizing the opinion of the court of appeals, stating that "it agreed with the district court's criticism of petitioners' regression analyses *as giving insufficient recognition to the varied qualifications for different jobs considered.*" (Res. Br. p. 6, emphasis added.) The court of appeals did not so find, and never even considered the question. The mischaracterization is not without significance. The court in *Valentino v. United States Postal Service*, 674 F.2d 56 (D.C. Cir. 1982), a case relied upon by respondents, held that failure to account for certain minimum job qualifications rendered multiple regression analyses useless as an indicator of discrimination in promotions into jobs with those qualifications. However, there is no similar issue here. Although many of the jobs held by class members were different, TVA had no objective minimum job qualifications that were not adequately taken into consideration by the years of education and technical degree variables and variables for specific kinds of degrees in the regressions, and respondents never claimed otherwise.

4. Finally, respondents state that requiring separate regression analyses for employees within the same job schedules did not "mask" any discrimination because there was no

evidence of movement from the custodial or clerical schedules to the scientific or technical schedules, and although there was some evidence of movement between the latter two, "there was no testimony by any blacks that they had been placed on an inappropriate schedule". (Res. Br. p. 11.) Both assertions are factually incorrect.

There was clear evidence of movement from the custodial or clerical schedules to the scientific or technical schedules. For example, George Davis, a black employee with a college degree, spent "15 or 20 years" as a janitor at TVA before finally being moved to the SE (technical) schedule. (PX 212B, Tr. pp. 20-23.)

There was also such clear testimony from blacks that they had in fact been placed in inappropriate job schedules and could not move from them that it is startling that the respondents claim otherwise. Although it happened early, perhaps the most egregious example was that of William T. Underwood, a black lawyer who was Assistant General Counsel of the U.S. Department of Transportation at the time he testified. Underwood testified that even though he had a law degree, he was hired by TVA as a gardener and later was transferred to the janitorial staff, from which he tried several times, unsuccessfully, to move. (PX 462, Tr. pp. 7-8.) A more recent example was John Holmes, a black with a college degree in chemistry. Holmes testified that he was misled by TVA into thinking that he was being hired as a scientist, but was assigned to work as a laboratory technician on the SE schedule in an all-black laboratory for over ten years before being promoted to the SD (scientific) schedule and then only after lodging an EEO complaint. (Tr. 1788-1817.) As Holmes testified: "I was put in this . . . laboratory; and I worked for a number of years trying to get out . . . The lab was just a deadbeat place. . . . I really didn't have a way out." (Tr. 1817.)

Similarly, petitioner Nash, a laboratory technician on the SE schedule, had a Masters degree in Business Administration and testified that because of his background and training he

had been trying unsuccessfully since the early 1960's to obtain a job in personnel on a different job schedule. Petitioner James, a TVA janitor for 30 years, testified that although he had college-level training in accounting, he could not move from the janitorial staff: "I've showed an interest in upward mobility in every way I know how. They asked me to fill out a form about job interests, its a form 9880B that's called Employee Skills and Interest Information Record. I never heard a word from it." (DX 8, p. 13.)[5]

* * *

The issues on this petition are neither trivial nor unworthy of this Court's attention. This case, which has been pending since 1973, represents a classic example of a case that this Court ought to review—one not only in which a clear injustice has been done to a class of black employees but in which this Court has a ready vehicle for affording critically needed guidance and predictability to litigants and the lower courts alike in structuring and understanding the essential statistical proof of discrimination the Title VII cases. Under those circumstances, it is of paramount importance that the Court's determination whether to hear this case be based upon a correct presentation of the facts and issues.

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[5] Respondents' statement that James "indicated that he was not interested in work other than custodial work at TVA and that he had turned down several offers to move to other kinds of work" (Res. Br. p. 4) is disingenuous. In fact, what James said was that six weeks before the trial, TVA offered him a position as an "operator trainee", a blue-collar job paying only $200 a year more than he was making. James testified that at his age (over 60) he was too old to become a "trainee". (Tr. 1087-1088.)

Conclusion

For the reasons stated herein and in the Petition for a Writ of Certiorari, the writ should be granted.

February 17, 1984.

Respectfully submitted,

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